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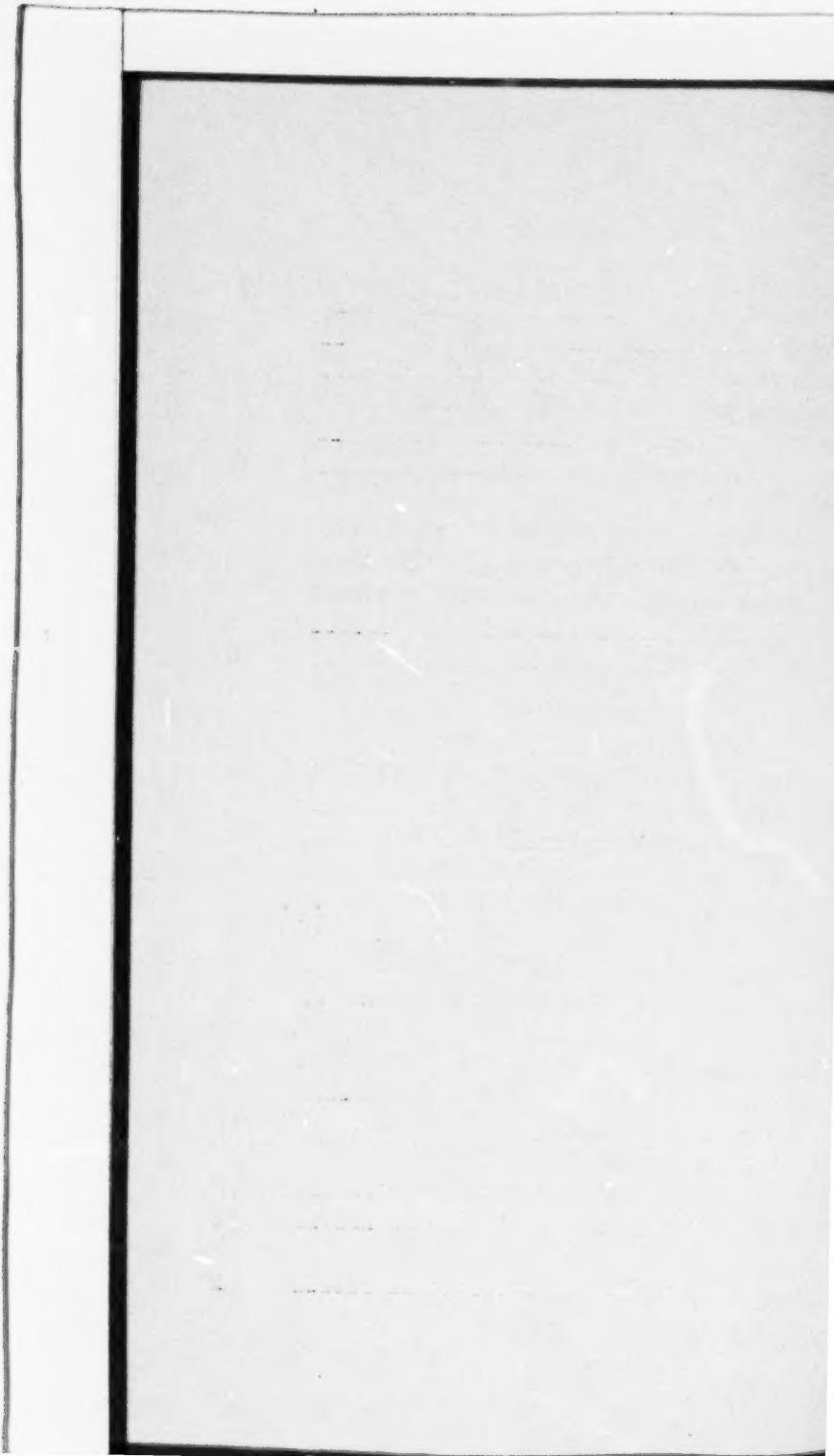

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 388

UNITED STATES OF AMERICA, PETITIONER

v.

ROOSEVELT HUDSON HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 24–26) is reported at 412 F. 2d 796.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1969. By order of Mr. Justice Stewart, dated June 26, 1969, the time for filing a petition for a writ of certiorari was extended to and including July 26, 1969. The petition for a writ of certiorari was filed on July 25, 1969, and granted on February 24, 1970. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commissioner could reasonably find, on the basis of the affidavit submitted, that there was probable cause to issue a search warrant.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.
>
> (b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property
>
> * * * * *
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; * * *
>
> * * * * *
>
> (c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the

judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. * * *

* * * * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that * * * (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued * * *.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, respondent was convicted of possessing nontax paid liquor, in violation of 26 U.S.C. 5205(a)(2), and sentenced to imprisonment for two years. The court of appeals reversed on the ground that the affidavit supporting a search warrant, the execution of which resulted in the discovery of some illicit liquor, was insufficient to establish probable cause.

The affidavit was made by Russell R. Bauer, a special investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The affiant stated that he had reason to believe that distilled

spirits in containers not bearing internal revenue stamps as required by law were being concealed in a described residence and nearby buildings belonging to respondent. The grounds for such belief were set forth in the following language:

> Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of non-taxpaid distilled spirits, and over this period I have received numerous information from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abondoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as the "dance hall," and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

In his motion to suppress, respondent raised four claims: that the affidavit supporting the search warrant was based upon hearsay; that the warrant and

affidavit did not properly describe the premises to be searched; that the illicit liquor found in the execution of the warrant was located on the premises of an adjoining neighbor;[1] and that the affidavit failed to state the reputation of the unnamed informant. At a hearing on the motion, agent Bauer, the affiant, testified that on June 17, 1967, he, another agent and Constable Johnson, after obtaining the warrant, conducted a search of respondent's residence. Inside the house they discovered a half-pint bottle filled with nontaxpaid liquor and a gallon jug partially filled (A. 13). Outside the house they followed a path running through a heavily weeded vacant lot. At two different spots within the open area, approximately one hundred feet from respondent's residence, agent Bauer discovered sacks of jugs, containing a total of six gallons of illicit whiskey (A. 14). After this testimony, respondent's motion was overruled.

On appeal respondent focused his attack upon the affidavit supporting the search warrant, and argued that the information contained therein was insufficient to justify issuance of a warrant. Respondent relied upon *Aguilar* v. *Texas,* 378 U.S. 108, which held that, where an affidavit is based upon hearsay information, the issuing magistrate must be informed of some of the underlying circumstances from which the informant based his allegations, and some of the underlying circumstances from which the law enforcement officer-affiant concluded that the informant was credible or his information reliable. While the appeal

[1] Following the testimony at the hearing on respondent's motion to suppress, defense counsel withdrew this ground (A. 19–20).

was pending, this Court decided in *Spinelli* v. *United States,* 393 U.S. 410, that if the showing of credibility or reliability is inadequate under the test suggested in *Aguilar,* an examination should be made of the other allegations which corroborate the information contained in the hearsay report to determine whether they, by their nature, provide an assurance of the informant's credibility or the reliability of his information. In its decision reversing respondent's conviction, the court of appeals, purporting to apply the standards of *Aguilar* and *Spinelli,* concluded that the affidavit failed to contain sufficient information to enable a magistrate to assess the informant's reliability or trustworthiness (A. 24–26).

SUMMARY

In *Aguilar* v. *Texas,* 378 U.S. 108, this Court recognized that a valid affidavit in support of a request for a search warrant could be based on hearsay information supplied by an informant. However, the Court held invalid the affidavit under consideration in that case because it failed to set forth any of the "underlying circumstances" that would enable the magistrate to judge independently the accuracy of the informant's conclusions, and because the affidavit did not substantiate the assertion that the informant was "credible" or his information "reliable." Although *Aguilar* made it clear that affidavits which merely alleged the skeletal facts stated by the informant and an unsubstantiated opinion of the informant's reliability would no longer be held to satisfy the requirements of the Fourth Amendment, the decision

did not alter the overriding principle that affidavits are to be read "in a commonsense way rather than technically." *United States* v. *Ventresca,* 380 U.S. 102, 109. Subsequent decisions of this Court have confirmed the Court's approval of a commonsense approach to search warrant applications. For example, in *Spinelli* v. *United States,* 393 U.S. 410, the Court decided that if the informant's tip is inadequate by itself to establish probable cause under the standard suggested in *Aguilar,* the magistrate should examine "the other allegations which corroborate the information contained in the hearsay report."

We believe that the instant case is an example of the difficulties which arise when lower courts attempt to apply the guidelines suggested in *Aguilar* and *Spinelli* in an excessively rigid and technical manner. Although the lower court acknowledged that the affidavit established unambiguously that the informant based his assertions on personal knowledge rather than on hearsay, the court did not recognize the extent to which this critical factor distinguishes the instant case from *Aguilar.* Applying the second criterion suggested by *Aguilar,* that the affidavit provide information as to the reliability of the informant, the court ignored the explicit detail related by the informant and erroneously discounted the affiant's assertion that he had interviewed the informant and found him to be a "prudent person."

We submit that the lower court opinion, if upheld, will leave little room for establishing the credibility of an informant who has not previousy supplied the police with information, and will also make it ex-

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tremely difficult to utilize information from an informant who wishes to remain anonymous. We do not believe that a commonsense approach to the review of search warrants requires such a result.

Finally, even under the technical reading of *Aguilar* adopted by the lower court, the affidavit in this case should have been upheld on the basis of "the other allegations which corroborate the information contained in the hearsay report", as suggested in *Spinelli*, 393 U.S. at 415.

ARGUMENT

THE AFFIDAVIT PRESENTED SUFFICIENT FACTS TO SUPPORT THE COMMISSIONER'S FINDING THAT THERE WAS PROBABLE CAUSE TO ISSUE A SEARCH WARRANT

In *Aguilar* v. *Texas*, 378 U.S. 108, this Court held invalid a search warrant issued upon an affidavit of police officers who swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises. While recognizing that the constitutional requirement of probable cause can be satisfied by hearsay information, the Court ruled against the affidavit in question because it did not set forth any of the "underlying circumstances" that would enable the magistrate to judge independently the accuracy of the informant's conclusion as to the location of the narcotics; nor did the affidavit attempt to support its assertion that the informant was "credible" or his information "reliable".

The Court in *Aguilar* did not intend to set forth rigid, technical rules for testing an affidavit; the opinion merely discussed some of the ways in which the

allegations made in an affidavit based upon hearsay could be substantiated so as to meet the constitutional standard of probable cause. Although *Aguilar* made it clear that affidavits which merely alleged the skeletal facts stated by the informant and an unsubstantiated opinion of the informant's reliability would no longer be held to satisfy the requirements of the Fourth Amendment, the decision did not alter the overriding principle that affidavits are to be read "in a commonsense way rather than technically." *United States* v. *Ventresca,* 380 U.S. 102, 109. Indeed, after *Aguilar,* this Court continued to state the applicable test in broad, commonsense language. For example, in *Berger* v. *New York,* 388 U.S. 41, 55, the Court reiterated that the probable cause which will support a search under the Fourth Amendment exists where "the facts and circumstances within the (officer's) knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."

Last Term, in *Spinelli* v. *United States,* 393 U.S. 410, the Court had before it an affidavit which, like the affidavit in *Aguilar,* failed to support the bald assertion that the informant was reliable, and which, in the Court's view, did not "contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation." 393 U.S. at 416. Finding the informant's tip inadequate by itself to establish probable cause, the Court proceeded to examine "the other

allegations which corroborate the information contained in the hearsay report," in order to determine whether these allegations lent enough additional weight to the tip so that the affidavit, considered as a whole, established probable cause. On balance, the majority in *Spinelli* found the corroborating allegations to be of insufficient probative value, and held the affidavit invalid. Mr. Justice Harlan, writing for the Court, made it clear that the *Spinelli* decision depended on its own facts, and that the commonsense approach to applications for search warrants had not been altered (393 U.S. at 419):

> In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing of criminal activity is the standard of probable cause, *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray* v. *Illinois*, 386 U.S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones* v. *United States*, 362 U.S. 257, 270–271 (1960). * * *

The instant case, we believe, is an example of the difficulties which arise when lower courts attempt to apply the guidelines suggested in *Aguilar* and *Spinelli* in a rigid, technical manner that loses sight of the commonsense nature of the relevant inquiry. The

court below recognized that the affidavit was distinguishable from the document held invalid in *Aguilar* in that it set forth the underlying circumstances on which the informer based his conclusions. Indeed, this crucial distinction is striking. The affidavit in the instant case related that the informant had made a "sworn verbal statement" that he had himself purchased illicit whiskey from the petitioner at the residence described, "for a period of more than 2 years, and most recently within the past 2 weeks." The informant also stated that he had "personal knowledge" of at least one other person who had purchased illicit whiskey from the petitioner in the past two weeks, and that he had personally seen petitioner "on numerous occasions" moving about from his residence to an outbuilding on the premises to obtain illicit whiskey for customers. Therefore, as the court below acknowledged, the critical problem in *Aguilar,* which was the absence of any indication that the informant had personal knowledge of the facts alleged in the affidavit, is not present in this case, for here there is unambiguous evidence that the informant had personally observed the presence of the illegal goods in the location to be searched, over a period of several years and in the last two weeks.

In spite of its recognition that the affidavit supplied ample "underlying circumstances" to support the informant's allegations, the court below held that the affidavit failed to meet the standard set forth in *Aguilar* because, in its view, "No information is provided which would enable the magistrate to assess [the informer's] reliability or trustworthiness" (A. 25). The

court appears to have ignored the fact that in *Aguilar* and other cases which have taken note of the absence of evidence bearing directly on the reliability of the informant and his information, it has not been clear from the affidavit that the informant was claiming personal knowledge of the events described; indeed, the Court in *Aguilar* stressed the fact that the affidavit did not reveal whether the informant was speaking from personal knowledge or from hearsay; had the affidavit, as here, unambiguously revealed that the informer was claiming personal knowledge of his assertions, the Court might well have relaxed its requirement that the affidavit present other direct evidence of the reliability of the informer and his information.

But even if we assume that the reliability-of-the-informer test suggested in *Aguilar* is fully relevant here, it is difficult to understand on what basis the court could conclude that the affidavit provided "[n]o information" on which the magistrate could evaluate the informer's reliability, unless *Aguilar* is deemed to establish a rigid requirement that the affiant set forth specific facts about the informant himself in order to establish the credibility of the information. Here explicit detail was provided in the affidavit—for example, the informant recited the approximate distance between the respondent's residence and the outbuilding where he kept his stock of illicit whiskey—as an indication that the information was reliable. As this Court pointed out in *Spinelli*, "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his infor-

mation in a reliable way." 393 U.S. at 417. See *Draper* v. *United States*, 358 U.S. 307.[2]

In fact, the court below did not even credit the affiant's assertion that he had "interviewed" the informant and found him to be a "prudent person." The court interpreted this statement by the affiant as revealing nothing about the informer's credibility, but as indicating only that the informer was "circumspect in the conduct of his affairs" (A. 25). In our view, the court's comment here reflects the type of unrealistic and "hypertechnical" interpretation that has no place in the review of search warrant affidavits. *United States* v. *Ventresca*, 380 U.S. 102, 108–109. In the context in which it is found in this affidavit, the term "prudent" was obviously not meant to describe the informant merely as circumspect or cautious, but rather as one upon whom the agent could rely to furnish credible and reliable information.

Indeed, it is this aspect of the lower court's opinion which most concerns the government, and which occasioned our request for certiorari in this case. the past, this Court has recognized that an informant's reliability may be established by showing that he has previously given information that proved reliable. See *McCray* v. *Illinois*, 386 U.S. 300. We believe, however, that there are circumstances in which a magistrate should be allowed to issue a warrant on the basis of information supplied by a person who has never be-

[2] The court below should also have taken note, we submit, of the fact that the informant gave his statement to the affiant under oath. See *United States* v. *Stallings*, 413 F.2d 200 (C.A. 7), certiorari denied, 396 U.S. 972.

fore provided information to the police. In fact, the person who supplies information to the police on only one occasion will often be a more reliable type of individual than one who supplies such information on a regular basis. The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals. Cf. *Jaben* v. *United States,* 381 U.S. 214, 224. On the other hand, a law-abiding citizen will rarely provide the police with information concerning a crime on more than one occasion. It seems unreasonable to say that a magistrate can rely entirely on information from the former but can rely on information from the latter only if it is corroborated by independent investigation.

We are also concerned that the decision below will make it difficult to establish probable cause on the basis of information received from anonymous informers. Frequently, circumstances will require that the identity of an informer be kept secret, either because he is an undercover agent or because, as here, the informer fears that disclosure of his identity will result in physical danger to himself or his family. Law enforcement officers ought to be able to act on information, even though the informer is unwilling to reveal his identity, when his information is specific, when he is willing to swear to the truth of his statements, when the officer is willing to swear that he found the informer credible, and when the information is consistent with other facts known to the law enforcement officers concerning the subject's reputation and activities.

This case presents, we submit, a clear example of the type of situation in which there is a sufficient basis for crediting the informant's assertions to permit the magistrate to rely on the anonymous informant's statements even though he has not previously provided information. Unfortunately, the narrow view taken by the lower court, which entirely discounted the affiant's opinion, based on an interview with the informant, that the informant appeared to be a reliable source of information, makes it very difficult to establish the credibility of an informant who has not previously supplied information to the police or who desires to remain anonymous. We submit that the court below should have given substantial weight to the officer's assertion that the affiant was a "prudent person," particularly in light of the explicit detail given by the informant and the personal nature of the knowledge which he claimed.

Finally, even if the lower court's narrow reading of *Aguilar* is upheld and the informer's tip is deemed to fall short of the standard suggested in that case, the affidavit should have been upheld on the basis of "the other allegations which corroborate the information contained in the hearsay report." *Spinelli, supra,* 393 U.S. at 415. The affidavit alleged that the police had known respondent for years as a dealer in illicit whiskey, and that the affiant had "received numerous information from all types of persons as to his activities." The police had located "a sizable stash of illicit whiskey in an abandoned house under Harris' control during this period of time." Thus, unlike the situation in *Spinelli,* where the Court char-

acterized the assertion that Spinelli was known to officers as a gambler as a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision," 393 U.S. at 414, the affiant here substantiated his assertions about respondent's general reputation with claims of "numerous" sources of information as to respondent's illegal activities, and with the citation of a specific instance in which illegal merchandise had been found on respondent's property. Although these allegations alone would not have established probable cause, they added substantial credibility to the informant's tip, and should not have been discounted by the court below. *Brinegar* v. *United States,* 338 U.S. 160, 171-174; *Rugendorf* v. *United States,* 376 U.S. 528.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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